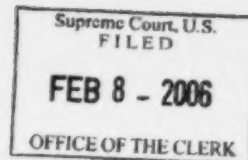


3

No. 05-965



IN THE SUPREME COURT OF THE UNITED STATES

HOWARD PAUL GUIDRY,
Petitioner

v.

DOUG DRETKE, Director, Texas Department of
Criminal Justice, Correctional Institutional Division

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Kenneth A. Williams
Southwestern University School of Law
675 S. Westmoreland Avenue
Los Angeles, CA 90036
(213)738-6806

Robert M. Rosenberg
1309 NE 23rd Street
Wilton Manors, FL 33305
(832)816-2955

ATTORNEYS FOR PETITIONER

Capital Case

QUESTIONS PRESENTED

1. Whether a state courts' findings of fact regarding the voluntariness of a confession, made without considering highly probative testimony, are entitled to a presumption of correctness.
2. Whether a state court's decision regarding the voluntariness of a confession was based on an unreasonable determination of the facts where it ignored crucial testimony.
3. Whether a federal habeas court abused its discretion by granting an evidentiary hearing when neither the AEDPA nor Rule 8 of the Rules Governing Section 2254 Cases precludes it from doing so.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
I. Facts of the Crime	1
II. Facts Relating to the Fifth Amendment Claim	1
SUMMARY OF THE ARGUMENT	8
ARGUMENT	8
I. The Court of Appeals' Holding That the State Court's Fact-Finding Was Defective Because it Ignored or Overlooked Highly Probative Testimony Central to Mr. Guidry's Claim is Consistent With Decisions of This Court and Other Courts of Appeal	9
II. The Lower Courts Properly Held That the Presumption of Correctness Was Rebutted by Clear and Convincing Evidence That Mr. Guidry Requested Requested Counsel During The Interrogation	12
III. The Court of Appeals Was Correct in Holding That the District Court had the Authority to Conduct an Evidentiary Hearing Under the AEDPA and Rule 8 of the Rules Governing Section 2254 Cases	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

	Page
<u>Guidry v. Dretke</u> , 397 F.3d 306 (5th Cir. 2005)	passim
<u>Guidry v. Dretke</u> , 2002 LEXIS 27685 (S.D. Texas 2002)	17
<u>Miller-El v. Cockrell</u> , 537 U.S. 322 (2003)	9, 11
<u>Taylor v. Maddox</u> , 366 F.3d 992 (9th Cir. 2004)	10, 11
<u>Michael Williams v. Taylor</u> , 529 U.S. 420 (2000)	18

Constitutions, Statutes and Rules

U.S. Const. amend V	passim
28 U.S.C. § 2254(e)(1)	12
28 U.S.C. § 2254(e)(2)	18
Rule 8 of the Rules Governing Section 2254 Cases in United States District Courts	18

Miscellaneous

Antiterrorism and Effective Death Penalty Act of 1996	passim
---	--------

STATEMENT OF THE CASE

I. Facts of the Crime

The panel opinion succinctly summarized the facts relating to the instant offense:

Farah Fratta was murdered on 9 November 1994; her husband, Robert Fratta, had hired Joseph Prystash to kill her. (Each received the death penalty). During a custodial interrogation approximately four months after Farah Fratta's murder, Guidry confessed to shooting Farah Fratta and leaving the scene with Prystash. At Guidry's trial, his confession, as well as hearsay testimony against Guidry's interest by Prystash's girlfriend, Mary Gipp, established that, for \$1000, Guidry agreed to help Prystash kill Farah Fratta.

II. Facts Relating to the Fifth Amendment Claim

There were important events relating to Mr. Guidry's Fifth Amendment claim, each discussed below: the March 7, 1995 interrogation of Mr. Guidry by the Harris County Sheriff Department; a March 15, 1995 conversation in a Texas state court judge's chambers; an August 28, 1996 motion to suppress hearing; a February 20, 1997 motion to suppress hearing and a December 13, 2002 federal evidentiary hearing.

a. March 7, 1995 interrogation

On March 7, 1995, Mr. Guidry was incarcerated on an unrelated bank robbery charge. Counsel had been appointed to represent him on this charge.¹ After receiving a possible lead regarding the murder of Farah Fratta, Ronnie Roberts and Jim Hoffman, detectives in the Harris County Sheriff's Department, interviewed Mr. Guidry. Tr. Vol. 24 at 50, 53, 101-02. Mr. Guidry asserts that he requested to speak with his attorney during this interview. Tr. Vol. 7 at 166, 167. He says that the officers subsequently informed him that they had spoken with his attorney who gave permission for Mr. Guidry to speak with the detectives. Tr. Vol. 7 at 171-72. As a result of this assurance, Mr. Guidry provided several statements implicating him in the Fratta murder. Tr. Vol. 7 at

¹ Layton Duer had been appointed to represent Mr. Guidry on the unrelated bank robbery charge.

174-75, 187. The detectives denied that Mr. Guidry ever asked during the interview to speak with counsel. Tr. Vol. 24 at 126.

b. August 28, 1996 hearing

The state court conducted a hearing as a result of Mr. Guidry's motion to suppress the statements he gave to the detectives during the March 7, 1995 interrogation. At this hearing Detective Roberts denied that Mr. Guidry requested either to speak with his attorney or to have him present. Tr. Vol. 3 at 21-22. Detective Roberts did, however, offer conflicting testimony about whether he was aware that Mr. Guidry was represented by counsel at the time:

Q: Were you aware of the fact that he, in fact, had an attorney representing him out of the bank robbery?

A: Somewhere, subsequent in the conversation, I was advised that he *did* have an attorney for the aggravated robbery.

Tr. Vol. 3 at 17-18 (emphasis added).

But later in the same hearing, Detective Roberts retreated from his acknowledgement that Mr. Guidry had counsel:

A: . . . I don't know if he had an attorney or not. I was, I assumed he, I don't know, he didn't tell me. I don't know how, whether he had been in jail and had been appointed an attorney [for the bank robbery charge], I never did confirm if he had an attorney.

Q: So now you are going back to say you didn't even know he had an attorney?

A: Just because somebody's lips move doesn't make it a prayer book. I never did confirm whether there was an attorney or not.

Q: So when he told you he had an attorney, you assumed he was lying right, so it wasn't a prayer book?

A: I'm not aware of how I was made aware of it, if he had an attorney or not.

The remainder of the testimony at this hearing is summarized by the Fifth Circuit's panel opinion:

... Gottlieb, a lawyer unaffiliated with the Guidry case, gave the following testimony about a 15 March 1995 conversation in the chambers of a Texas state judge (approximately a week after the interrogation/confession.). The judge was not present; the following persons were: Gottlieb, Guidry's two attorneys for the murder charge, Scott and Yarborough; Assistant District Attorney Rizzo; and two Harris County Sheriff's detectives. During this conversation, one of the detectives remarked that he had been involved in obtaining Guidry's confession for the investigation of Farah Fratta's murder.

Scott and Yarborough, who had been appointed on or about the very day to defend Guidry on the murder charge, asked about the circumstances under which Guidry confessed. Gottlieb testified about the detective's response:

Q: Was there any discussion [by the detectives] about whether or not Howard Guidry had an attorney?

A: ... I think I said something to the effect that well, you know, he has an attorney on the aggravated robbery. They said, Yes, we talked to the attorney and got permission to talk to Guidry before we took him out to have his statement ...
[W]e all looked at each other in total and complete amazement ... I mean we were shocked that that would have occurred. That the lawyer gave them permission to talk to a man being accused of capital murder ... [that a] defense attorney would even do that. I mean I specifically remember elbowing ... Yarborough, going, Who is that [lawyer?]

Duer, Guidry's robbery-charge attorney, also testified at the 1996 hearing. According to his testimony: he told Guidry not to talk to any officers; he was never contacted by any detectives or by anyone else; and he never gave anyone permission to discuss any matter with Guidry.

Guidry v. Dretke, 397 F.3d 306, 313 (5th Cir. 2005).

Because the detectives contradicted Gottlieb's account of the in-chambers conversation, Scott and Yarborough realized that they would be required to testify about the conversation. Id. They therefore moved for a continuance so that they could withdraw and new counsel could be appointed to represent Mr. Guidry. Id.

c. **February 20, 1997 hearing**

After Scott and Yarborough withdrew as Mr. Guidry's counsel, a new motion to suppress hearing was held. Mr. Guidry testified that he had been instructed by Layton Duer not to "make any statements to anyone for any reason." Tr. Vol. 7 at 155. He further testified that once questioning commenced, he asked the police to contact his attorney so that he could be present during the questioning. Tr. Vol. 7 at 166-67, 170, 188. Detective Hoffman told him "no." Tr. Vol. 7 at 167. The two detectives then left the room for over an hour. Tr. Vol. 7 at 168. Mr. Guidry testified that after Detective Hoffman returned and he was presented with Joe Prystash's statement implicating him, he renewed his request to speak with his attorney. Tr. Vol. 7 at 170. Mr. Guidry testified that he informed the officers that Layton Duer was his attorney. Tr. Vol. 7 at 171. According to Mr. Guidry, Detective Hoffman left the room, saying that he was going to talk to Guidry's attorney. Tr. Vol. 7 at 170-71. Some time later, Detective Hoffman returned, telling Mr. Guidry that he had talked to his attorney who "said it was all right for [Guidry] to answer the questions and don't worry about it. Tr. Vol. 7 at 171-72. Mr. Guidry decided to cooperate with the police when he was told by Detective Hoffman that his attorney had given him clearance to speak with the police. Tr. Vol. 7 at 175, 187, 191. Mr. Guidry also testified that Detective Hoffman promised him a lenient sentence if he confessed to being the triggerman. Tr. Vol. 7 at 163-64, 198.

Mr. Guidry's testimony was strongly corroborated by a conversation that occurred in Judge Joe Kegans' chambers on March 15, 1995. First, Sylvia Yarborough testified that she was present when attorneys Deborah Gottlieb and Bob Scott, tow Harris County Sheriff Office detectives and Dan Rizzo, an Assistant Harris County District Attorney,

were all in Judge Kegans' chambers. Tr. Vol. 7 at 105. Yarborough testified that Detective Roberts was one of the detectives but she was not sure of the identity of the other detective. Tr. Vol. 7 at 105. Yarborough testified that she heard Bob Scott ask Detective Roberts to explain taking Mr. Guidry out and getting a confession from him when the detective knew he had a lawyer. Tr. Vol. 7 at 107. She testified that Detective Roberts' response was that he called and talked to the lawyer and it was okay with the lawyer to interview Mr. Guidry. Tr. Vol. 7 at 108. Yarborough testified that her initial impression was shock that any lawyer would give such permission. Tr. Vol. 7 at 108. During cross-examination, she testified that she was positive that it was Detective Roberts who made the remark. Tr. Vol. 7 at 119. Yarborough testified that Detective Roberts didn't sound sarcastic but rather he sounded like he had been caught off-guard. Tr. Vol. 7 at 115-16.

Another lawyer, Deborah Gottlieb, testified that she overheard an in-chambers conversation between Bob Scott and two officers on March 15, 1995. Tr. Vol. 7 at 132. She testified that she heard one of the officers say that he had contacted Mr. Guidry's lawyer and had gotten permission to talk to him. Tr. Vol. 7 at 132. Gottlieb testified that she didn't know the name of the officer and that she thought it was the shorter officer who made the remark, but that she was not sure of that. Tr. Vol. 7 at 132.

Robert Scott testified that he was present during the in-chambers conversation on March 15, 1995, along with Sylvia Yarborough, Deborah Gottlieb, Dan Rizzo and a couple of Harris County Sheriff Office detectives when one of the officers mentioned taking Mr. Guidry's confession. Tr. Vol. 7 at 140. Scott testified that he reacted by asking the officer why he took the statement when Mr. Guidry had a lawyer at the time.

Tr. Vol. 7 at 141. Scott testified that the officer's response was that they knew Mr. Guidry had a lawyer when they took the statement but that they checked with the lawyer and had gotten permission to talk with Mr. Guidry. Tr. Vol. 7 at 140. Scott testified that his initial reaction was to be upset with the lawyer for giving such permission. Tr. Vol. 7 at 142. Scott identified Detective Roberts as the officer who made the remark. Tr. Vol. 7 at 146, 149.

Mr. Guidry was further corroborated by the testimony of Layton Duer, his robbery-charge attorney. Duer testified that he did not receive a call from anyone from the Harris County Sheriff's Office seeking his permission to speak with Mr. Guidry. Tr. Vol. 7 at 124. Duer also testified that he specifically told Mr. Guidry not to speak with anyone about any cases unless he was present and that if any officers came to get a statement from him to tell them he had a lawyer and have the officer call Duer. Tr. Vol. 7 at 123.

Detective Roberts was asked "Do you recall a conversation in Judge Keegan's chambers where some defense attorneys representing Howard Guidry were present?" to which he responded, "No, sir, I don not." Tr. Vol. 7 at 203. He also gave the following testimony regarding his knowledge of whether Mr. Guidry was represented by counsel at the time of the interrogation:

Q: For the record, today, tell us what you knew about who Howard Guidry's attorney was or what information you had at the time the conversation took place between you and him on March the 7, 1995?

A: I had no knowledge that he had an attorney.

Q: At any time during your conversation with . . . Mr. Guidry, either by Detective Hoffman or anybody else in the interview room that date on

March 7, 1995, did you learn that Howard Guidry did, in fact, have an attorney on the Klein Bank Robbery?

A: No, sir.

Later in the hearing, Detective Roberts contradicted this testimony:

Q: Did [Guidry] ever tell you he had an attorney?

A: Yes, sir.

Tr. Vol. 7 at 31.

d. Federal Evidentiary Hearing

On December 13, 2002, a federal evidentiary hearing was held in the Southern District of Texas. At this hearing, Mr. Guidry reiterated that he invoked his right to counsel prior to providing a statement to the Harris County detectives. (Evidentiary Hearing transcript, hereinafter "EH" at 17). Mr. Guidry also reiterated his earlier testimony that after he invoked his right to counsel, Detective Hoffman returned after a while and announced that he had contacted Mr. Guidry's attorney and that his attorney had indicated that he should speak with the detectives. EH at 18. Furthermore, the attorney witnesses reiterated their testimony that, when confronted, Detective Roberts indicated that they had contacted Mr. Guidry's robbery-charge attorney who gave them permission to speak with Mr. Guidry. EH at 39, 46, 58. Finally, Layton Duer testified that he gave Mr. Guidry his business card with instructions not to speak with anyone else. EH at 12. Duer further testified that he was never contacted by anyone seeking permission to speak with Mr. Guidry. EH at 12.

Detective Roberts retracted his earlier denial regarding the in-chambers conversation and admitted that the conversation did in fact occur and that he was present but that he had no recollection of the nature of the conversation that took place. EH at

67. He also testified that he contacted a Harris County Assistant District Attorney because "I knew he had been in jail for several days; and usually after a suspect has been in jail for two or three days, an attorney is appointed to them in most cases." EH at 68.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision affirming the district court's grant of federal habeas relief is in accord with decisions of both this Court and other federal courts of appeals. Because the state court failed to consider evidence crucial to Mr. Guidry's claim that his confession was illegally obtained, its findings were not entitled to a presumption of correctness. Mr. Guidry offered other evidence that the state court's findings were not entitled to any presumption of correctness, including the inconsistent and contradictory testimony of the officers and statements by the state trial judge on the record. The state court's ultimate finding, that the confession was voluntarily obtained, was based, therefore, on an unreasonable determination of the facts and the district court was correct in granting relief. The Fifth Circuit properly upheld the district court's grant of habeas relief.

Furthermore, the Fifth Circuit properly found that, under the AEDPA and Rule 8 of the Rules Governing Section 2254 Cases in the United State District Courts, the federal habeas court was not precluded from granting an evidentiary hearing and did not abuse its discretion.

The Court of Appeals decision was consistent with decisions of this and other federal courts and with the AEDPA and thus there is no need for this court to consider this matter further by granting certiorari.

ARGUMENT

I. The Court of Appeals' Holding That the State Court's Fact-Finding Was Defective Because it Ignored or Overlooked Highly Probative Testimony Central to Mr. Guidry's Claim is Consistent With Decisions of This Court and Other Courts of Appeal.

Although the Anti-Terrorism and Effective Death Penalty Act (hereinafter "AEDPA") mandates substantial deference for state court determinations of fact, the Supreme Court has made it clear that:

deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. *A federal court can disagree with a state court's credibility determination* and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

In the case at bar, four attorneys testified during the motion to suppress hearing in state court. Their testimony substantially corroborated Mr. Guidry's assertion that he requested to speak with his attorney, who had been appointed to represent him on an unrelated charge, during the Harris County detectives' interrogation of him and that these detectives falsely informed him that the attorney had authorized Mr. Guidry's cooperation without his attorney being present. The trial judge's only comment regarding this testimony was that *"I'm perfectly satisfied that the - that the Scott, Gottlieb, Yarborough conversation, while the author of the comment may very well be up in the air, the substance of the comment is not."* Tr. Vol. 24 at 234-35. In its findings and conclusions, the trial court found Mr. Guidry was not credible but the detectives were. See Guidry v. Dretke, 397 F.3d 306, 325 (5th Cir. 2005). Despite the unusual occurrence of four members of the bar testifying in his court on behalf of a suspect charged with capital murder, the trial court made no mention of this testimony in its ultimate findings and

never attempted to reconcile the above quoted statement with these findings. Based on the state court record, it is not possible to fairly infer from the state record that the trial judge found the four attorneys not to be credible given the above quoted statement and other actions on the part of the trial judge.² The only rational inference that can reasonably be drawn from the trial judge's comments regarding the attorney's testimony is that the detectives *were not* credible and that Mr. Guidry, whose testimony was corroborated by the attorneys, was credible.

The federal habeas court found that, under these circumstances, the state court's adjudication of the claim was based on an unreasonable determination of the facts and the Court of Appeals agreed. See Guidry v. Dretke, 397 F.3d 306, 329 (5th Cir. 2005). The Court of Appeals' holding that a state court's failure to make findings on critical evidence negates the § 2254(e)(1) presumption of correctness and causes the fact finding to be unreasonable is consistent with the holdings of this Court and with other circuits. In Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004) the circumstances were strikingly similar to the case at bar: Defendant was questioned during a murder investigation without the presence of an attorney to advise him during questioning. Id. at 997. He subsequently inculpated himself. Id. at 997. At his motion to suppress hearing, defendant testified that he repeatedly asked for a lawyer prior to confessing and that his request was denied. Id. at 998. The detective denied defendant's allegations. Id. at 998. An attorney also testified that he received a telephone call from defendant shortly after he had given his confession. Id. at 1005. The attorney testified that defendant informed him of the details

² For instance, when one of the attorneys testified, the trial judge asked counsel for both sides if they waived her being sworn, noting that, although she had "not [been] a long time member of the bar", she was "experienced." After counsel agreed to the waiver, the trial court stated: "*Ms. Gottlieb, we trust you.*" Guidry v. Dretke, 397 F.3d 306, 314 (5th Cir. 2005).

of the interrogation, including his request for counsel, therefore strongly corroborating defendant's testimony. Id. at 1005. Neither the state trial court nor the state appellate court even acknowledged the attorney's testimony. Id. at 1005. The Ninth Circuit held that a rational fact-finder might have discounted this testimony or found it incredible "but no rational fact-finder would simply ignore it. Yet this is precisely what the state courts did . . ." Id. at 1006. The Ninth Circuit held that "by making their findings without taking [the attorney's] testimony into account, the state courts made an 'unreasonable determination of the facts.'" Id. at 1008. "The state courts might have disbelieved [the attorney witness] or perhaps discounted his testimony, but they were not entitled to act as if it didn't exist." Id. at 1008. This Court has also clearly stated that the state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim. See Miller-El v. Cockrell, 537 U.S. 322, 346 (2003) ("our concerns are amplified by the fact that the state court also had before it and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past.").

All courts deciding this issue are in agreement that state court findings which ignore or overlook crucial evidence are not entitled to a presumption of correctness and are unreasonable. Guidry v. Dretke, 397 F.3d 306, 329 (5th Cir. 2005); Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004); Miller-El v. Cockrell, 537 U.S. 322, 346 (2003). Because there is a uniform rule of federal law, there is no need for this court to grant appellant's petition for writ of certiorari.

II. The Lower Courts Properly Held That the Presumption of Correctness Was Rebutted by Clear and Convincing That Mr. Guidry Requested Counsel During the Interrogation.

As discussed earlier, the courts have held that the 2254(e)(1) presumption of correctness accorded to state court findings of fact is overcome by a state court's failure to consider crucial evidence. Every federal court that has reviewed this case has found that Mr. Guidry met his burden of proof in overcoming the presumption of correctness. The lower courts found that Mr. Guidry overcame the presumption of correctness with the following evidence:

a. Mr. Guidry's testimony - Mr. Guidry testified that his robbery-charge attorney instructed him not to discuss anything with anyone (including officers and other prisoners). Tr. Vol. 7 at 155. Mr. Guidry further testified that after Detectives Roberts and Hoffman confronted him with pictures of Farah Fratta's body he became frightened and as a result he requested to speak with his attorney. Tr. Vol. 7 at 166-67. Mr. Guidry further testified that the detectives left him alone for around one and a half hours before Detective Hoffman returned, saying that he had a statement from Prytash implicating Mr. Guidry. Tr. Vol. 7 at 170. The detective then gave the statement to Mr. Guidry to read and claimed he had other evidence as well but that they would work out a deal if Mr. Guidry cooperated. Tr. Vol. 7 at 185, 187. Mr. Guidry further testified:

... I asked [Detective Hoffman] again, I - really didn't ask him, I kind of demanded that I speak to my lawyer that second time, because I was - I was really getting scared after the second time ...

And when I told him that, he told me he was going to contact my attorney. At that point in time, he picked up the statement and he left ... the room.

Tr. Vol. 7 at 170.

Guidry testified that Detective Hoffman:

... asked me before he left ... the room - when I asked him for my attorney the second time, he asked me who my lawyer was. And I told him Mr. Layton Duer.

And he said: 'I'm going to contact your attorney and we're going to see what he says, right.' And he stayed in the room maybe a minute getting paperwork together, and he left ... the room.

Tr. Vol. 7 at 171.

According to Mr. Guidry, after some time passed, Detectives Roberts and Hoffman returned, saying they had contacted Mr. Guidry's attorney:

Detective Hoffman ... told me he had contacted my attorney.

He told me my attorney said it was all right for me to answer the question, and don't worry about it, you know, it was no problem.

Tr. Vol. 7 at 171-72.

As a result of this exchange, and in reliance on the alleged conveyed authorization from his attorney, Mr. Guidry inculpated himself. Tr. Vol. 7 at 175.

b. The testimony of the four attorney witnesses - Mr. Guidry's version of the events preceding his confession was corroborated by the consistent testimony of four members of the bar. Deborah Gottlieb, a lawyer unaffiliated with the case, testified that she was present on March 15, 1995 in the chambers of a Texas state judge (approximately a week after the interrogation/confession). Tr. Vol. 7 at 132. The judge was not present; the following persons were present: Gottlieb, Mr. Guidry's two court-appointed attorneys for the murder charge, Robert Scott and Sylvia Yarborough; Assistant District Attorney Rizzo; and two Harris County Sheriff's detectives. Tr. Vol. 7 at 132. Gottlieb testified that the officers were questioned about the circumstances under which Mr. Guidry confessed. Tr. Vol. 7 at 132. The detectives indicated that they had spoken to Mr.

Guidry's robbery-charge attorney and that he had given them permission to talk to Mr.

Guidry concerning the Fratta murder. Tr. Vol. 7 at 132. According to Gottlieb:

And at that point, Sylvia and I elbowed each other - Ms. Yarborough and I elbowed each other, looking and rolled our eyes going: What idiot was that, meaning, why would a defense attorney do that?

Tr. Vol. 7 at 132.

Yarborough testified that on March 15, 1995, she was present in the judge's chambers during the in-chambers conversation with the detectives who, when asked about interrogating Mr. Guidry without his attorney being present, Detective Roberts responded: "I talked to his lawyer, and his lawyer said it was okay to talk to him." Tr. Vol. 7 at 108. Yarborough testified that she was absolutely sure this is what Detective Roberts said and that she thought he was serious. Tr. Vol. 7 at 115-16.

Robert Scott testified that after the detectives were queried about interrogating Mr. Guidry without his attorney's present:

The response was that they knew [Guidry] had an attorney at the time they took the statement, but they had checked with that attorney and got permission to go ahead and talk to Howard Guidry.

Q. Now, just so that the record is clear. Did the officer indicate to you that he talked with the attorney on the aggravated robbery case and got permission to take the confession in the capital case?

A. Yes, sir. He said that he knew [Guidry] had an attorney - referring to the other attorney - and that . . . they had called and gotten permission from that attorney to talk to Mr. Guidry before they took the statement in the capital murder case.

Tr. Vol. 7 at 141-42.

Finally, Layton Duer, Mr. Guidry's robbery-charge attorney, testified that he gave Mr. Guidry his business card with instructions not to speak with anyone else. Tr. Vol. 7

at 123. Duer also testified that no one ever contacted him seeking permission to speak with Mr. Guidry. Tr. Vol. 7 at 123.

c. The detectives' inconsistent and contradictory testimony - The detectives testified inconsistently on two key points: 1) the March 15, 1995 in-chambers conversation and 2) their knowledge that Mr. Guidry was represented by counsel.

Regarding the March 15, 1995 in-chambers conversation, Detective Roberts was asked at the February 20, 1997 suppression hearing ". . . Do you recall ever having a conversation in Judge Keegan's chambers where some defense attorneys representing Howard Guidry were present?" to which he responded, "No, sir I do not." Tr. Vol. 7 at 203. Seven years later, however, he testified that he did recall the in-chambers conversation although he has no recollection of the nature of the conversation that took place. EH at 67.

The detectives also gave inconsistent testimony when asked if they knew that Mr. Guidry had an attorney when they interrogated him. At the first pre-trial hearing, Detective Roberts offered conflicting testimony about knowledge of Mr. Guidry's representation. He initially testified that "somewhere, subsequent in the conversation, I was advised that he did have an attorney for the aggravated robbery." Tr. Vol. 3 at 17-18. But later in the same hearing he retreated from his earlier unambiguous statement testifying that "I don't know if he had an attorney or not." Tr. Vol. 3 at 26-27. Then at the second pre-trial hearing, Detective Roberts testified "I had no knowledge that he had an attorney." Tr. Vol. 7 at 12-13. During the same hearing, he was asked "Did [Guidry] ever tell you he had an attorney?" to which he replied, "Yes, sir." Tr. Vol. 7 at 31. At the federal evidentiary hearing, Detective Roberts testified that he had contacted an attorney -

Assistant District Attorney Ted Wilson - to ask if he could question Mr. Guidry about the murder, because he knew that, based on Mr. Guidry's having been in jail several days on another charge, he probably had an attorney. EH at 68. Furthermore, Detective Billingsley testified at the motion to suppress hearing that he was "sure [he] knew that " Mr. Guidry had an attorney. Tr. Vol. 3 at 73.

Mr. Guidry's testimony, the corroboration of his testimony by the consistent testimony of the four attorney witnesses, the trial judge's failure to make any findings or other wise attempt to reconcile this testimony with its findings and the inconsistent and conflicting testimony of the detectives regarding the March 15, 1995 in-chambers conversation and whether they were aware that he had an attorney was clear and convincing evidence that the state court's findings that Mr. Guidry did not ask to speak with his robbery-charge attorney and that Mr. Guidry was not told by the detectives that his robbery-charge attorney had given him permission to speak with them were not entitled to any presumption of correctness. Thus, the lower courts were correct in concluding that the state court's decision that Mr. Guidry's confession was voluntarily obtained was based on an unreasonable determination of the facts.

III. The Court of Appeals Was Correct in Holding That the District Court had the Authority to Conduct an Evidentiary Hearing Under the AEDPA and Rule 8 of the Rules Governing Section 2254 Cases.

The State made no objection to the evidentiary hearing before the federal habeas court and thus the court was never afforded an opportunity to rule on the State's objection. See Guidry v. Dretke, 397 F.3d 306, 319 (5th Cir. 2005) ("In neither instance did the State object to an evidentiary hearing; it certainly did *not* present the narrow hearing-is prohibited issue it raises now.").

In making an objection for the first time before the Fifth Circuit and this Court, the State has mischaracterized the federal habeas court's reasons for granting an evidentiary hearing. In an order denying Respondent's motion for summary judgment, the court clearly set forth its reasons for granting an evidentiary hearing in this case:

Having extensively reviewed the facts of this case, this Court is unable to grant Respondent's summary judgment motion at this time. Substantial factual questions persist surrounding Guidry's confessions. The state courts made no attempt to evaluate the veracity of the attorney testimony or analyze its implication in this case. The state courts made no finding with respect to the inconsistent and contradictory testimony by the police officers. If the allegations in Guidry's petition, as corroborated by the attorneys' testimony, are true, the reasonableness of the state court decision is suspect. For this Court to fully evaluate the circumstances surrounding this claim, further factual development is appropriate. Factual development would aid this Court in determining whether clear and convincing evidence rebuts the trial finding that Guidry did not request counsel. Also, the factual development would clarify the ultimate question of the reasonableness of the state court's determination.

Guidry v. Dretke, 2002 U.S. Dist. LEXIS 27685 at 22-23 (S.D. Texas 2002) (Appendix I)

Although the same witnesses testified at the evidentiary hearing, the State is not accurate in stating that the federal habeas court heard the same evidence presented in state court. In fact, important new evidence was extracted from the *State's* witness:

For example, Detective Roberts testified at the district court hearing that: prior to questioning Guidry on 7 March 1995, he contacted an assistant district attorney to ensure there would be no conflict in his doing so because Detective Roberts knew that, for persons in Guidry's circumstances (in jail for several days on another charge (bank robbery)), 'usually . . . an attorney is appointed [for] them'; nevertheless, for the 7 March interrogation of Guidry, he did not know Guidry had an attorney. As another example, Detective Roberts did recall the 15 March 1995 in-chambers conversation.

Guidry v. Dretke, 397 F.3d 306, 320-21 (5th Cir. 2005). This evidence was useful in sorting out the participants in the March 15, 1995 in-chambers conversation and in determining the reasonableness of the state courts' fact-finding process.

28 U.S.C. § 2254(e)(2) provides that a district court may not hold an evidentiary hearing "[i]f the applicant failed to develop the factual basis of a claim in State court proceedings . . ." [A] failure to develop the factual basis of a claim is not established unless there is a lack of diligence . . ." Michael Williams v. Taylor, 529 U.S. 420, 430-32 (2000). "Diligence . . . depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court . . ." Id. at 435

As the Court of Appeals indicated, there clearly was no lack of diligence on Mr. Guidry's part in presenting the factual basis of his claim in state court. Mr. Guidry moved to suppress his confession and a hearing was held during which he presented the testimony of 4 witnesses besides his own testimony. Furthermore, Mr. Guidry presented the claim in his state habeas petition. Thus, no reasonable argument can be made that the statute precluded the federal habeas court from conducting an evidentiary hearing.

Because it was not precluded by the AEDPA, the federal habeas court had discretion under Rule 8 of the Rules Governing Section 2254 Cases in United States District Courts. The version of Rule 8 in effect when the hearing was granted provided:

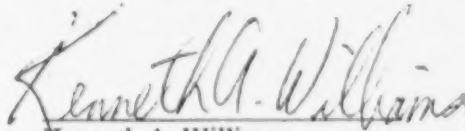
If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings *and of the expanded record, if any, determine whether an evidentiary hearing is required.* If it appears that an evidentiary hearing is *not* required, the judge shall make such disposition of the petition as justice shall require.

An evidentiary hearing was needed in the case because of the deficiencies in the state court's fact-finding process. The federal habeas court had the authority under both the AEDPA and Rule 8 to conduct a hearing and the court did not abuse its discretion in doing so.

CONCLUSION

Even the Dissent to the Denial of the Petition for Rehearing En Banc concedes that "the panel majority's result may be justifiable . . ." Guidry v. Dretke, 2005 U.S. App. LEXIS 23000 at 35 (5th Cir. 2005). Because the state court completely ignored the testimony of 4 attorney-witnesses, its finding that Mr. Guidry's confession was voluntarily obtained was based on an unreasonable determination of the facts and had to be reversed. The Fifth Circuit's decision is consistent with the decisions of this court and other circuits and as a result there is no need for any further consideration of this matter by granting certiorari.

Respectfully submitted,



Kenneth A. Williams
Southwestern University School of Law
675 S. Westmoreland Ave.
Los Angeles, CA 90005
Tel: (213)738-6806
Fax: (213)738-6698

Robert M. Rosenberg
1309 N.E. 23rd St., Unit A
Wilton Manors, FL 33305
Tel: (832)816-2955
Fax: (954)565-2605

ATTORNEYS FOR HOWARD PAUL GUIDRY

LEXSEE

HOWARD PAUL GUIDRY, Petitioner, v. JANIE COCKRELL, Director, Institutional Division, Texas Department of Criminal Justice, Respondent.

CIVIL NO. H-01-CV-4140

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

2002 U.S. Dist. LEXIS 27685

September 10, 2002, Decided

SUBSEQUENT HISTORY: Writ of habeas corpus granted, Summary judgment granted, in part, summary judgment denied, in part by *Guidry v. Dretke*, 2003 U.S. Dist. LEXIS 26199 (S.D. Tex., Sept. 25, 2003)

PRIOR HISTORY: *Guidry v. State*, 9 S.W.3d 133, 1999 Tex. Crim. App. LEXIS 145 (Tex. Crim. App., 1999)

DISPOSITION: Respondent's Motion for Summary Judgment denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner inmate filed a petition for a writ of habeas corpus. The inmate claimed, inter alia, that the trial court failed to dismiss an objectionable juror for cause and that the police secured his confession in a manner which violated the Fifth Amendment's privilege against self-incrimination. Respondent warden moved for summary judgment and argued that the operation of federal law precluded habeas corpus relief.

OVERVIEW: The inmate contended that the trial court's determination that he did not invoke his right to counsel was unreasonable in light of the conflicting testimony. Also, the inmate pointed to inconsistencies in the police testimony that would indicate their awareness that he was represented by counsel during the interrogation. In sum, the inmate contended that the state court's incomplete determination was an unreasonable application of federal law. The court found that the warden was not entitled to summary judgment on the inmate's habeas petition because substantial factual questions regarding whether the police secured the inmate's confession in a manner which violated the Fifth Amendment's privilege against self-incrimination persisted, and if the allegations in the inmate's petition, as corroborated by the attorneys'

testimony, were true, the reasonableness of the state court decision was suspect. Because factual development would aid the court in determining whether or not the state court's rejection of the inmate's claim was reasonable under 28 U.S.C.S. § 2254(d), the court intended to conduct an evidentiary hearing to determine if the inmate invoked his right to counsel.

OUTCOME: The warden's motion for summary judgment was denied.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues

[HN1] See 28 U.S.C.S. § 2254(d).

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues

[HN2] Legal issues or mixed questions of law and fact are evaluated under 28 U.S.C.S. § 2254(d)(1). A state-court decision is contrary to United States Supreme Court precedent if: (1) the state court's conclusion is opposite to that reached by the Supreme Court on a question of law; or (2) the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at an opposite result.

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues

[HN3] A state court may unreasonably apply federal law if it identifies the correct legal rule from United States Supreme Court cases but unreasonably applies it to the particular facts of the particular state prisoner's case or if the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should ap-

ply. To be unreasonable, the state court application of federal law must be something more than merely erroneous. To provide relief, a federal habeas court must not only conclude that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Civil Procedure > Summary Judgment > Summary Judgment Standard

Criminal Law & Procedure > Habeas Corpus > Standards of Review

[HN4] When reviewing summary judgment on a petition for habeas corpus, consistent with the provisions of 28 U.S.C.S. § 2254(d), a federal court presumes all state court findings of fact to be correct in the absence of clear and convincing evidence.

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Remain Silent

[HN5] In *Miranda*, the United States Supreme Court held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. Under *Miranda*, a person must be advised of the right to remain silent and the right to have an attorney present.

Criminal Law & Procedure > Counsel > Right to Counsel

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Remain Silent

[HN6] The United States Supreme Court has held that, once a suspect in custody invokes the Fifth Amendment right to counsel, the police may not interrogate the suspect in the absence of counsel, even if the suspect later attempts to waive that right. Under the Court's holding, any statement made by the suspect in response to police-initiated questioning after an invocation of the right to counsel violates the Fifth Amendment and must be excluded. The Court's rigid prophylactic rule embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he: (a) initiated further discussions with the police; and (b) knowingly and intelligently waived the right he had invoked.

Criminal Law & Procedure > Habeas Corpus > Standards of Review

[HN7] State factual findings are entitled to a presumption of correctness under 28 U.S.C.S. § 2254(e)(1).

Criminal Law & Procedure > Habeas Corpus > Evidentiary Hearings

[HN8] When a district court elects, in instances not barred by 28 U.S.C.S. § 2254(e)(2), to hold an evidentiary hearing, the hearing may assist the district court in ascertaining whether the state court reached an unreasonable determination under either 28 U.S.C.S. § 2254(d)(1) or (2).

COUNSEL: [*1] For Howard Paul Guidry, Petitioner: Pro se, Livingston, TX; Kenneth Anthony Williams, Gonzaga Univ Schol of Law, Spokane, WA; Robert M Rosenberg, Attorney at Law, Wilton Manors, FL.

For Douglas Dretke, Respondent: Tina Joann Dettmer, Attorney General Office, Austin, TX.

JUDGES: VANESSA D. GILMORE, UNITED STATES DISTRICT JUDGE.

OPINIONBY: VANESSA D. GILMORE

OPINION:

ORDER

Pending before the Court is Howard Paul Guidry's ("Guidry") Petition for Writ of Habeas Corpus. (Instrument No. 6). Respondent Janie Cockrell ("Respondent") filed a motion for summary judgment arguing that the operation of federal law precludes habeas corpus relief on the claims presented in Guidry's petition. (Instrument No. 9). In his federal petition for habeas relief, Guidry raises four claims: (1) the admission of hearsay testimony at trial violated the *Confrontation Clause*; (2) the State engaged in misconduct by informing the jury that a co-conspirator received a death sentence; (3) the trial court failed to dismiss an objectionable juror for cause; and (4) the police secured his confession in a manner which violated the *Fifth Amendment's* privilege against self-incrimination. Having considered the parties' submissions, [*2] the operation of applicable federal law -- particularly the application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), and the state court record, the Court concludes that Respondent is not entitled to summary judgment at this point in the proceedings. For the purposes of judicial economy, the Court will only consider Guidry's final ground for relief at this time. n1

n1 If the Court were to grant federal relief on Guidry's *Fifth Amendment* claim, the result would

be the vacating of his conviction and sentence, thus mooted his other claims. Also, the resolution of his hearsay claim depends, in part, on the outcome of his *Fifth Amendment* claim. On direct review the Court of Criminal Appeals avoided the question of whether a witness' testimony containing hearsay statements by a coconspirator violated Guidry's rights by finding their admission to be harmless. See *Guidry v. State*, 9 S.W.3d 133, 147-52 (Tex. Crim. App. 1999), cert. denied, 531 U.S. 837, 148 L. Ed. 2d 57, 121 S. Ct. 98 (2000). The Court of Criminal Appeals partially based its harmless determination on the admission of Guidry's confessions. However, the only trial testimony supporting the charge as spelled out in the indictment (capital murder for remuneration) came from the hearsay testimony and the confession. Any harmless error inquiry with respect to the hearsay testimony, therefore, is dependant on the validity of the confession. Judicial economy suggests that the Court address the *Fifth Amendment* claim before the others. The Court would note, however, that it appears that an evidentiary hearing is not required to resolve the other three claims.

[*3]

I. Background

The State of Texas convicted and sentenced Guidry to death for the murder-for-hire of Farah Fratta. Trial testimony demonstrated that Guidry agreed to kill Ms. Fratta for one-thousand dollars. At trial, the State presented two written statements by Guidry and a videotaped walk-through of the crime scene. In the instant federal proceedings, Guidry claims that the police secured his confessions without regard to his invocation of his right to counsel.

Before trial, Guidry sought to suppress his incriminating statements. On August 28, 1996, the trial court originally held a hearing concerning Guidry's motion to suppress. Tr. Vol. 3 at 8-103. When it became apparent that Guidry's counsel (Sylvia Yarborough and Robert Scott) would need to testify in his behalf, the trial court granted a continuance. Tr. Vol. 5 at 19.

After the appointment of new counsel, the trial court held a hearing on February 20, 1997, in which the parties presented evidence relating to Guidry's confession. n2 The State presented evidence from Ronnie Roberts, Jim Hoffman, and Danny Billingsly, the three Harris County Sheriff Department officers involved in taking Guidry's confession. Their [*4] testimony established that Guidry was incarcerated on an unrelated aggravated robbery

charge in early March 1995. Appointed counsel (Layton Duer) represented Guidry in that action. In Guidry's February 20 hearing, each police officer testified that they did not know that an attorney represented Guidry in his aggravated robbery case. Tr. Vol. 7 at 12-13, 77, 99. n3 Detective Roberts later admitted that Guidry told him that he had an attorney, but Guidry never indicated that he wanted to speak with counsel. Tr. Vol. 7 at 31-32.

n2 Loretta Johnson Muldrow and Alvin Nunnery represented Guidry at the February 20 hearing and at trial.

n3 This testimony conflicted with Detective Roberts earlier testimony that "some time during the time that [they] talked to [Guidry]," the officers became aware of the fact that he was represented by counsel. Tr. Vol. 3 at 17-26. In the August 28 hearing, Sergeant Billingsly also testified that he was "sure [he] knew that" Guidry was represented by counsel. Tr. Vol. 3 at 73. The officers testified that Guidry did not invoke his right to counsel, yet he did not explain how they came to find out about his representation during the interrogation.

[*5]

The officers explained how they transferred Guidry from the Harris County jail to the homicide office for the purpose of interviewing him about the Fratta murder. While traveling to the homicide office, the officers testified that they gave Guidry the *Miranda* warnings, but they did not interview him in the car. Tr. Vol. 7 at 20, 42-43, 71.

At the police station, the police confronted Guidry with certain facts about the murder. Tr. Vol. 7 at 47, 67. According to the officers' account, Guidry then admitted some involvement in the murder, but claimed only to be the get-away driver. Tr. Vol. 7 at 74. n4 The police again informed Guidry of his rights. Tr. Vol. 7 at 48. The police typed a statement which Guidry then signed. Guidry also initialed the form's recital of his constitutional rights. Specifically, Guidry acknowledged his right to have counsel present and right to end the interview at any time. The State introduced this written confession at trial as State's Exhibit 73. n5

n4 At the February 20 hearing, Detective Roberts testified that they did not question Guidry concerning the aggravated robbery case. Tr. Vol. 7 at 23. Detective Roberts, however, admitted that he testified otherwise at the August 28 hearing. Compare Tr. Vol. 3 at 17 with Tr. Vol. 7

at 23. Defense counsel cross-examined Detective Roberts extensively about this conflicting testimony. Tr. Vol. 7 at 22-33.

[*6]

n5 The original written confession contained the wrong date. State's Exhibit 73. The officers had Guidry change the date on a copy of the statement. The State introduced the corrected statement as State's Exhibit 73-A. Tr. Vol. 7 at 53-54.

Aware that the written statement conflicted with other information known to the officers, they asked Guidry to consent to a polygraph examination. Tr. Vol. 7 at 55. Guidry failed the polygraph test. After the officers confronted Guidry with the test results, he agreed to give a second statement. Tr. Vol. 7 at 57, 76. The police again informed Guidry of his rights. Guidry then gave a second confession, admitting that he shot Ms. Fratta. Guidry also claimed that Joseph Prystash offered him a thousand dollars to be the gunman. Guidry again initialed on the statement that he had been informed of his rights. The State introduced the second confession at trial as State's Exhibit 74.

After Guidry signed the second confession, the police asked him if he would be willing to participate in a walk-through of the crime scene. At the crime scene, the police again read [*7] Guidry his rights. The police videotaped Guidry as he described how he killed Ms. Fratta. The State introduced the videotape at trial as State's Exhibit 156.

The defense also presented testimony during the suppression hearing. Guidry now relies on the same evidence to challenge the introduction of his confession. During the hearing, Guidry himself testified. Guidry claimed that, when the police transported him to the homicide office, they did not read him his rights. Tr. Vol. 7 at 158. When they arrived at the homicide office, Guidry and Detective Hoffman were left alone in an interview room. Detective Hoffman began questioning him about his participation in bank robberies. Tr. Vol. 7 at 163-65. When Detective Roberts entered the room, he started showing Guidry photographs of Ms. Fratta's corpse. Tr. Vol. 7 at 166. Guidry then asked to speak to his attorney. Tr. Vol. 7 at 166. n6 Detective Hoffman told him "no." Tr. Vol. 7 at 167. The two officers then left the room for over an hour. Tr. Vol. 7 at 168. Later, Detective Hoffman returned and told Guidry that the police had obtained a statement from his accomplice, Joseph Prystash. Tr. Vol. 7 at 169. After Guidry read the statement, he [*8] "demanded" that the officers let him

contact his attorney. Tr. Vol. 7 at 170. Detective Hoffman asked who his attorney was and left the room, saying that he was going to talk to counsel. Tr. Vol. 7 at 170-71. Some time later, Detective Hoffman returned, telling Guidry that he had talked to the attorney. Detective Hoffman "said it was all right for [Guidry] to answer the questions and don't worry about it." Tr. Vol. 7 at 171-72. Guidry decided to cooperate with the police when he heard that his counsel had given him clearance to speak with the police. Tr. Vol. 7 at 175, 187, 191. n7

n6 Interestingly, in the August 28 hearing when Detective Roberts was first asked if Guidry had requested counsel he responded "I was not present when he said that." Tr. Vol. 3 at 26.

n7 Guidry's counsel for the aggravated robbery charge, Layton Duer, had previously told him not to talk to the police. Tr. Vol. 7 at 123.

On cross-examination, Guidry testified that, his initials on the written forms notwithstanding, the police [*9] first read him his rights during the videotaped walk-through. Tr. Vol. 7 at 181-82. Guidry also stated that Detective Hoffman promised him a lenient sentence if he confessed to being the triggerman. Tr. Vol. 7 at 198.

The defense supported Guidry's story with the testimony of the attorneys first appointed to represent him in the capital murder proceedings, Sylvia Yarborough and Robert Scott. They testified concerning an event that transpired in another state judge's chambers. On March 15, 1995, the trial court appointed Ms. Yarborough and Mr. Scott to represent Guidry on the capital murder charge. Tr. Vol. 7 at 104, 139. That day, those two attorneys, an Assistant District Attorney, another lawyer and two police officers (including Detective Roberts) were in the judge's chambers. Tr. Vol. 7 at 105. The attorneys heard the one detective turn to Detective Roberts and ask "What do you mean taking Mr. Guidry out, getting in a -- getting a confession when you knew he had a lawyer?" Tr. Vol. 7 at 107. Detective Roberts told him "I talked to his lawyer, and his lawyer said it was okay to talk to him." Tr. Vol. 7 at 108, 141-42. Another attorney present in the room, Deborah Gottlieb, confirmed [*10] the details of this conversation. Tr. Vol. 7 at 131-32. n8

n8 Ms. Gottlieb, however, expressed some confusion over which police officer made the statement. Tr. Vol. 7 at 134-35.

Mr. Duer, Guidry's attorney from the aggravated robbery case, testified that he had never been contacted

by the police with respect to the Frattz murder and that he did not give them permission to speak to his client. Tr. Vol. 7 at 123-24. This testimony suggested that the police feigned a conversation with counsel in order to trick Guidry into confessing.

The trial court orally denied Guidry's motion to suppress after the hearing. Tr. Vol. 7 at 213-14. At trial, the defense wished to place before the jury the question of whether Guidry invoked his right to counsel. When trial counsel attempted to call Mr. Duer as a witness, the trial court questioned whether his testimony would present a question for the jury to decide. Regarding the conversation that occurred in chambers, the trial court stated "I'm perfectly satisfied that the -- [*11] that the Scott, Gottlieb, Yarborough conversation, while the author of the conversation may very well be up in the air, the substance of the comment is not." Tr. Vol. 24 at 234-35. The trial judge, however, thought that this testimony would be immaterial "unless there is some testimony somewhere from somebody, whether it direct or implicit, or circumstantial, that in fact, the defendant did not waive his rights and, in fact, asserted one or more of them. Unless that occurs, it doesn't make any difference what his lawyers told him." Tr. Vol. 24 at 240. Out of the jury's presence, the trial court then heard substantially the same evidence as presented in the suppression hearing. After considering that testimony, the trial court held that the evidence did not raise a question for the jury to consider regarding the waiver of Guidry's rights. Tr. Vol. 24 at 289-90.

After the conclusion of the trial and the initiation of Guidry's appeal, the trial court issued findings of fact and conclusions of law explaining its decision. Tr. Vol. I-A at 423-29. The trial court extensively reviewed the testimony presented by the State at the suppression hearing. While the trial court discussed Guidry's [*12] own testimony, it did not address, much less issue findings of fact concerning, the testimony by the attorneys. After considering the State's evidence, the trial court found that the police had warned Guidry of his constitutional rights and Guidry had waived those rights. Tr. Vol. I-A at 429. The trial court found that "at no time did [Guidry] state he wanted to have an attorney present prior to or during any questioning; at no time did he indicate he wanted an attorney present to advise him ?" Tr. Vol. I-A at 430. The trial court concluded that Guidry had been informed of his rights at least five times and that he intelligently and knowingly waived those rights. Tr. Vol. I-A at 430.

On direct review, Guidry asked the Court of Criminal Appeals to remand his case for further fact-finding, arguing that the trial court's failure to address the defense testimony rendered the trial determination insufficiently detailed to permit appellate review. The Court of Criminal Appeals recognized that the trial findings did not

address conflicts in the record, but held that "the trial court is required to set forth the facts which support its conclusions, but need not outline the testimony [*13] which does not support its conclusions." *Guidry v. State*, 9 S.W.3d 133, 141 (Tex. Crim. App. 1999), cert. denied, 531 U.S. 837, 148 L. Ed. 2d 57, 121 S. Ct. 98 (2000). Reviewing the trial findings, the Court of Criminal Appeals found that the finding that Guidry did not request the presence of counsel provided a sufficient basis for appellate review. See *Guidry*, 9 S.W.3d at 142.

In the Court of Criminal Appeals, Guidry also raised a claim that the police took his statement in violation of his *Fifth Amendment* rights. n9 Guidry focused on the inconsistent testimony in the suppression hearing. Guidry claimed that the police officers tricked him into confessing by pretending that his counsel gave him permission to talk to them. Guidry highlighted the fact that the trial court's findings and conclusions did not mention his evidence about the conversation in judge's chamber and his own account of the interrogation. The Court of Criminal Appeals rejected Guidry's claim as follows:

n9 Guidry additionally argued that the trial court violated his *Sixth Amendment* right to counsel because he was entitled to have the attorney appointed for the aggravated robbery charges present during the capital-murder confession. This is of no moment. The right to counsel only attaches at the initiation of formal criminal proceedings. See *Texas v. Cobb*, 532 U.S. 162, 167-74, 149 L. Ed. 2d 321, 121 S. Ct. 1335 (2001) (holding that the right to counsel does not attach to uncharged, separate offenses); *McNeil v. Wisconsin*, 501 U.S. 171, 175-76, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991) (finding that the right to counsel is offense-specific). At the time of his confession, criminal proceedings had not been initiated against Guidry in the Fratta murder. He had no *Sixth Amendment* entitlement to counsel for the capital murder case when he confessed.

[*14]

There was conflicting testimony as to whether appellant requested his attorney during the interrogation. The interrogating officers testified that appellant did not ask to speak to an attorney; appellant testified that he requested to talk to his attorney. The trial court found that appellant was fully aware of his rights, including the rights to remain silent and to seek the assistance of counsel. The trial court further

concluded that appellant knowingly, intelligently, and voluntarily waived his rights. There is evidence in the record supporting these findings. Because the trial court is in the best position to evaluate the credibility of the witnesses and their testimony, we defer to the trial court's findings.

Guidry, 9 S.W.3d at 143, n10

n10 Guidry also challenged his confession on state habeas review. The state habeas court procedurally barred his claim because it had been raised and rejected on direct review. *State Habeas Record* at 143 P 5. The state habeas court did review the facts supporting the trial determination and pointed out discrepancies in Ms. Gottlieb's testimony. *State Habeas Record* at 129-38. The state habeas court did not discuss Mr. Scott or Ms. Yarborough's testimony. In its alternative ruling, the state court found that Guidry failed to prove that the police took his statement in violation of the *Constitution*. *State Habeas Record* at 143 P 6.

[*15]

In these proceedings, Guidry argues that the trial court failed to consider the testimony from the four attorneys that bolstered his credibility. Guidry contends that the trial court's determination that he did not invoke his right to counsel was unreasonable in light of the conflicting testimony. Specifically, Guidry contends that the trial court's silence with respect to the attorney testimony implicitly accuses members of the bar with perjury—an unlikely and unreasonable conclusion. Yet Guidry notes that the state court's trial comments inexplicably find their account of the chamber's conversation to be credible. Also, Guidry points to inconsistencies in the police testimony that would indicate their awareness that he was represented by counsel during the interrogation. In sum, Guidry contends that the state court's incomplete determination was an unreasonable application of federal law. Guidry's contention must be addressed in the context of the AEDPA.

II. Analysis

A. The AEDPA

This issue comes before the Court under the AEDPA's limited review. Under the relevant portions of the AEDPA,

[HN1] An application for a writ of habeas corpus on behalf of a person [*16] in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The deferential standard outlined above differs depending on whether the state court engaged in a legal, factual, or mixed inquiry.

[HN2] Legal issues or mixed questions of law and fact are evaluated under 28 U.S.C. § 2254(d)(1). See *Gachot v. Stadler*, 298 F.3d 414, 417-18 (5th Cir. 2002). A state-court decision is contrary to Supreme Court precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) the "state court confronts facts that are materially indistinguishable from a relevant [*17] Supreme Court precedent" and arrives at an opposite result. *Terry Williams v. Taylor*, 529 U.S. 362, 406, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). n11 Guidry's primary argument is not that the state determination was contrary to federal law; he instead relies on the "unreasonable application" prong of § 2254(d)(1).

n11 On April 18, 2000, the Supreme Court issued two separate opinions, both originating in Virginia, involving the AEDPA in which the petitioners had the same surname. *Terry Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000) involves § 2254(d)(1) and *Michael Williams v. Taylor*, 529 U.S. 420, 146 L. Ed. 2d 435, 120 S. Ct. 1479 (2000) involves § 2254(e)(2). To avoid confusion, this Court will

include the full name of the petitioner when citing these cases.

[HN3] A state court may unreasonably apply federal law if it "identifies the correct legal rule from [Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle [*18] from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Terry Williams*, 529 U.S. at 407. "To be unreasonable, the state court application of federal law must be something more than merely erroneous." *DiLosa v. Cain*, 279 F.3d 259, 262 (5th Cir. 2002). To provide relief, a federal habeas court must not only conclude that "the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Terry Williams*, 529 U.S. at 411; see also *Penry v. Johnson*, 532 U.S. 782, 793, 150 L. Ed. 2d 9, 121 S. Ct. 1910 (2001); *Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be unreasonable.").

[HN4] "When reviewing summary judgment on a petition for habeas corpus, consistent with the provisions of 28 U.S.C. § 2254 [*19] (d), [a federal court] presumes all state court findings of fact to be correct in the absence of clear and convincing evidence." *Ogan v. Cockrell*, 297 F.3d 349, 358 (5th Cir. 2002). The Court will consider Guidry's allegations in light of the above-mentioned standard.

B. The Merits

Guidry contends that the admission of his statements violated his *Fifth Amendment* right to counsel. [HN5] "In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602(1966), [the Supreme Court] held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence." *Dickerson v. United States*, 530 U.S. 428, 431, 147 L. Ed. 2d 403, 120 S. Ct. 2326 (2000). Under *Miranda*, a person must be advised of the right to remain silent and the right to have an attorney present. See *Miranda*, 384 U.S. at 478-479.

In his petition, Guidry claims that the taking of his confessions violated the principles enshrined in *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). "In *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), [HN6] the Supreme Court held that, once a suspect in [*20] custody invokes

the *Fifth Amendment* right to counsel, the police may not interrogate the suspect in the absence of counsel -- even if the suspect later attempts to waive that right." *United States v. Avants*, 278 F.3d 510, 514-15 (5th Cir.), cert. denied, 536 U.S. 968, 153 L. Ed. 2d 854, 122 S. Ct. 2683 (2002); see also *Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 77 L. Ed. 2d 403, 103 S. Ct. 2830 (1983) (stating that *Edwards* set forth a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers. . . ."). "Under *Edwards*, any statement made by the suspect in response to police-initiated questioning after an invocation of the right to counsel violates the *Fifth Amendment* and must be excluded." *Avants*, 278 F.3d at 515. The "rigid" prophylactic rule [of *Edwards*] embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived [*21] the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95, 83 L. Ed. 2d 488, 105 S. Ct. 490 (1984) (citations omitted). Both inquiries are at issue in this case.

On direct review the Court of Criminal Appeals expressly deferred to the trial court's factual findings and legal conclusions. The trial court unequivocally found that Guidry did not "ever ask to remain silent; at no time did he ever indicate he didn't want to make any statement at all; at no time did he state he wanted to have an attorney present prior to or during any questioning; at no time did he indicate he wanted an attorney present to advise him; and at no time did [he] indicate that he wanted to end the interview." Tr. Vol. I-A at 429-30. This issue comes before the Court under the deferential review afforded state factual findings. [HN7] Such findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). Guidry may rebut the presumption of correctness by clear and convincing evidence.

Having extensively reviewed the facts of this case, this Court is unable to grant Respondent's summary judgment motion at this time. Substantial factual questions persist surrounding Guidry's confessions. [*22] The state courts made no attempt to evaluate the veracity of the attorney testimony or analyze its implication in this case. The state courts made no specific finding with respect to the inconsistent and contradictory testimony by the police officers. If the allegations in Guidry's petition, as corroborated by the attorneys' testimony, are true, the reasonableness of the state court decision is suspect. For this Court to fully evaluate the circumstances surrounding this claim, further factual development is appropriate. Factual development would aid this Court in determining whether clear and convincing evidence re-

but the trial finding that Guidry did not request counsel. Also, the factual development would clarify the ultimate question of the reasonableness of the state court's determination. See *Valdez v. Cockrell*, 274 F.3d 941, 952 (5th Cir. 2001) [HN8] ("When a district court elects, in instances not barred by § 2254(e)(2), to hold an evidentiary hearing, the hearing may assist the district court in ascertaining whether the state court reached an unreasonable determination under either § 2254(d)(1) or (d)(2)."). To that end, the Court will hold an evidentiary hearing [*23] limited to the issue of Guidry's *Fifth Amendment* claim. n12

n12 Having reviewed the record, especially in light of Guidry's effort to remand his direct appeal for fact-finding, the Court finds that Guidry has complied with 28 U.S.C. § 2254(e)(2)'s threshold standard of diligence. See 28 U.S.C. § 2254(e)(2); *Michael Williams*, 529 U.S. at 432.

The Court, however, must comment on the allegations in Respondent's summary judgment motion. Respondent argues that the testimony from the chambers episode is not as beneficial as anticipated by Guidry's claim. Respondent focuses on three main factors: (1) the police denied making the statements; (2) if the episode in chambers indeed occurred, the motive behind the statement is unclear; and (3) the statement does not prove that Guidry invoked his right to counsel. These factors, however, do not detract from the strength of Guidry's assertion. First, while Detective Roberts testified that no one made the [*24] statement in question, three members of the bar testified otherwise. Detective Roberts' testimony in that respect is suspect. This is especially the case as Detective Roberts gave contradictory and inconsistent testimony on other grounds. Second, the fact that the motive behind the statement is unclear highlights the inadequacies of the state review. Respondent's attempt to characterize the statement as a joke is pure speculation, accentuating the need for factual development. It is especially difficult to ascertain Detective Roberts' motive from the record because he emphatically denied making any such statement in chambers. Tr. Vol. 7 at 203. Finally, while the officer making the comment did not expressly say that Guidry had invoked his right to counsel, the Court cannot turn a blind eye to the fact that the comment is based on the assumption that Guidry asked to speak to counsel. The police would have no need to concoct a story about getting an attorney's permission to speak with a client if Guidry did not request counsel's assistance. The comment by the police does more than enhance Guidry's credibility and detract from their own, it shows that the police potentially ignored Guidry's [*25] right to counsel.

Respondent also claims that, even if the episode occurred, any improper admission of the confession was harmless error. That argument cannot carry the day here. Aside from Guidry's confession, little evidence demonstrated his guilt for capital murder. Only three other factors pointed to his guilt: (1) his possession of the murder weapon; (2) weak and inconclusive eyewitness testimony showing that someone dressed like Guidry killed Ms. Fratta; and (3) statements made by Prystash to his girlfriend implicating Guidry in the murder-for-hire. However, the Court of Criminal Appeals held that Prystash's hearsay statements were harmless because the jury may have based its verdict on Guidry's confessions. If the Court assumes that the confessions were erroneously admitted, it may be improper to rely on those statements to show any harmlessness of the hearsay statements. Thus, the evidentiary picture constructed from the remaining properly-admitted evidence may implicate Guidry in the murder, but it would not support the factor which made the killing a capital offense: that Guidry committed the murder for remuneration. In the end, the confession formed a substantial role in [*26] the jury's determination which, if in error, was injurious to Guidry's case. The admission of the confessions was not harmless.

Factual development would aid the Court in determining whether or not the state court's rejection of this claim was reasonable as understood by the AEDPA. The Court, therefore, will conduct an evidentiary hearing in which the parties will present evidence to determine if Guidry invoked his right to counsel. The Court is particularly interested in exploring the conversation in which the police stated that they had contacted Guidry's counsel, the conflicting suppression-hearing testimony by the police officers, and the reasonableness of the trial court's decision.

III. Conclusion

Based on the discussion above, the Court denies Respondent's motion for summary judgment. n13 An evidentiary hearing is scheduled for November 1, 2002, at 9:30 a.m. Counsel shall file their proposed witness and exhibit lists by October 15, 2002.

n13 The Court did not address the merits of Guidry's prosecutorial misconduct and impartial jury claims. The summary judgment motion relating to those claims is denied without prejudice to reurge after the Court holds the evidentiary hearing.

[*27]

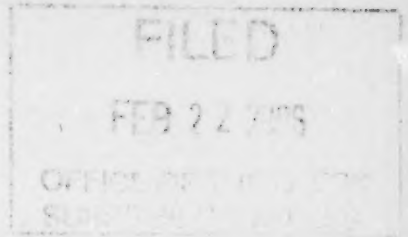
The Clerk will provide a copy to the parties.

Signed at Houston, Texas, on September 10, 2002.

UNITED STATES DISTRICT JUDGE

VANESSA D. GILMORE

①
No. 05-965



IN THE SUPREME COURT OF THE UNITED STATES

HOWARD PAUL GUIDRY,
Respondent,

v.

**DOUG DRETKE, Director, Texas Department of
Criminal Justice, Correctional Institutional Division**
Petitioner.

**On Petition For Writ of Certiorari
to the Texas Court of Criminal Appeals**

REPLY BRIEF

GREG ABBOTT
Attorney General of Texas

***GENA BUNN**
Chief, Assistant Attorney General
Postconviction Litigation

Division
BARRY R. McBEE
First Assistant Attorney General

TINA J. DETTMER
Assistant Attorney General
Postconviction Litigation Division

DON CLEMMER
Deputy Attorney General
For Criminal Justice

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1600

* Counsel of Record

ATTORNEYS FOR PETITIONER

TABLE OF AUTHORITIES

	Page
<i>Baston v. Kentucky</i> , 476 U.S. 79 (1986)	3
<i>Lavalle v. Delle Rose</i> , 410 U.S. 690 (1973)	3
<i>Marshall v. Longberger</i> , 459 U.S. 422 (1983)	3
<i>Miller v. Fenton</i> , 474 U.S. 104 (1985)	1,2
<i>Rice v. Collins</i> , 126 S. Ct. 969 (2006)	3,4
<i>Taylor v. Maddox</i> , 366 F.3d 922 (9 th Cir. 2004)	1,2
Constitutions, Statutes, and Rules	
28 U.S.C. § 2254(1)	3
Miscellaneous	
Antiterrorism and Effective Death Penalty Act of 1996	3,4

REPLY

The Fifth Circuit's opinion in this case is not consistent with decisions from this Court and other circuit courts of appeals. Guidry maintains that certiorari review is not necessary in this case because "[a]ll courts deciding this issue are in agreement that state court findings which ignore or overlook crucial evidence are not entitled to a presumption of correctness and are unreasonable." Opposition at 11. He relies upon this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003), and the Ninth Circuit's opinion in *Taylor v. Maddox*, 366 F.3d 922, 1006-1008 (9th Cir. 2004) for support. However, neither case is applicable in this instance.

Guidry is correct in pointing out that both *Miller-El* and *Maddox* were concerned, at least in part, with the adequacy of the state court fact-finding process where the state court apparently ignored or failed to consider relevant evidence. See *Miller-El*, 537 U.S. at 346 (stating that "Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the [] District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past."); *Taylor v. Maddox*, 366 F.3d at 1005 (finding that "[t]he state courts' failure to consider, or even acknowledge, [] highly probative testimony casts serious doubt on the state-court fact-finding process and compels the conclusion that the state-court decisions were based on an unreasonable determination of the facts.").

Nevertheless, these cases do not control here. Contrary to Guidry's contention, the state trial court did not ignore the testimony offered by the four attorneys during the suppression hearing in deciding whether Guidry's confession was obtained in violation of the Fifth Amendment. Although the trial court's

findings of fact did not specifically reference the attorneys' testimony, the record bears out that this testimony was considered by the state trial court in making a very difficult credibility determination.

At the close of the second suppression hearing, the trial court made the following comments:

Let me be sure that I'm hearing accurately. And this is just so that I'm satisfied in my mind-eye of the following. Do we agree that in Judge Kegans' courtroom chambers the conversation was absolutely meaningless, except as it relates to credibility?

7 SR 211. A few moments later, the trial court stated for purposes of the record that his understanding of the ultimate question was whether or not Guidry had asserted his rights and asked for a lawyer to be present. The judge also reiterated his view that the conversation that allegedly took place in the Judge's chambers was relevant only to the extent that it bore on Guidry and the detective's credibility. 7 SR 211-213.

The fact that the state trial court did not make explicit reference to the testimony of the four attorneys in its factual findings is of no moment. Unlike *Miller-El* and *Taylor*, where there was nothing in the record indicating that the state court had considered the evidence in question, it is clear from the record in this case the court considered this evidence to the extent that it weighed on Guidry and/or the detectives' credibility concerning whether Guidry had, in fact, asked for his lawyer to be present during questioning.

Thus, implicit in the state court finding that the detectives' testimony was credible, is a finding that the attorneys' testimony

did not persuade the court that Guidry had told the truth when he told the court he had requested an attorney be present during the police interrogation. Furthermore, for reasons stated more fully in the Director's petition for certiorari review, these implicit findings are entitled to the same presumption of correctness afforded to explicit factual findings under 28 U.S.C. § 2254(e)(1). See *Marshall v. Lonberger*, 459 U.S. 422 (1983); *LaValle v. Delle Rose*, 410 U.S. 690 (1973). It is the failure to afford proper deference to this implicit finding and the other credibility determinations made by the state trial court that places the Fifth Circuit's opinion in this case at odds with precedent from this Court and other courts of appeals. See Petition at 11-17.

Notably, in the time that has elapsed since the Director filed his petition for writ of certiorari, the Court announced its opinion in *Rice v. Collins*, 126 S. Ct. 969 (2006), which clearly controls the issue here. Certiorari review was granted in that case because the Court was "[c]oncerned that, in [a] habeas corpus case, a federal court set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record." *Id.* at 972. It was decided that a federal habeas court could not supersede the state trial court's credibility determinations regarding the viability of the prosecutor's race-neutral explanations proffered in response to a *Baston*¹ challenge simply because it disagreed with the findings made by the state court. *Id.* at 976. Specifically, the Court stated that "The panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the State court does not satisfy AEDPA's² requirements for granting a writ of habeas corpus." *Id.*

¹ *Baston v. Kentucky*, 476 U.S. 79 (1986).

² Antiterrorism and Effective Death Penalty Act (1996).

Rice is applicable here. The court of appeals in this case accepted the district court's substitution of its own credibility determinations for those made by the state trial and appellate courts. After holding a hearing that produced substantially the same information as that offered during the state court suppression hearings, the district court explicitly stated that it wanted to make its own credibility determinations. Furthermore, the district court acknowledged in its opinion that those credibility determinations were based on the "same live witnesses, and presumptively same demeanor, as was presumably considered by the trial court." Appendix C at 15. Thus, with little, if any, new information, the federal district court replaced the state court's credibility findings with its own equally debatable determinations.

Because the instant case is materially indistinguishable from *Rice*, this Court must grant certiorari review to resolve the conflict that exists between the Fifth Circuit's published decision in *Guidry* and authority issued from this Court. Alternatively, because this Court's decision in *Rice* was not available to the Fifth Circuit in deciding this case, this Court should grant, vacate, and remand to the court of appeals for reconsideration in light of *Rice*.

CONCLUSION

For the reasons stated above, the Director respectfully requests that this Court grant certiorari review to ensure uniform application of the AEDPA. Alternatively, this Court should grant, vacate, and remand to the court of appeals in light of *Rice v. Collins*.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

*GENA BUNN
Chief, Assistant Attorney General
Postconviction Litigation Division

*Counsel of Record

TINA J. DETTMER
Assistant Attorney General
Postconviction Litigation
Texas Bar No. 24026139
P. O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
Fax: (512) 320-8132

ATTORNEYS FOR PETITIONER